(1) 90-1830

Supreme Court, U.S.
FILED
MAY 28 1991
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BOYD COUNTY BOARD OF EDUCATION
Petitioner

vs.

UNITED STATES FIDELITY & GUARANTY CO.
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Should a Kentucky school board which spent more than $725,000.00 to finish its high school be permitted to seek recovery of its money from the bonding company for a defaulting building contractor by amending its complaint under Rule 15 of the Federal Rules of Civil Procedure to do so?

2. Should the United States Court of Appeals for the Sixth Circuit without opinion have approved the procedures in District Court which barred the school board from proceeding against the bonding company until a suit between the prime contractor and the nominal owner of the premises was concluded, and then when it was concluded summarily dismissed the school board's action without even permitting it to file its claim?

3. Was a school board, which after the prime contractor overdrew contract funds and defaulted leaving insufficient funds to finish the work, a "volunteer" when it scraped together enough money to finish the job so that it would have a completed building to house its students?

4. Should the school board's conduct have been deemed inequitable so as to prohibit it from filing its amended complaint before any evidence was or could have been presented from which such inferences conceivably could have been drawn?

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The opinion of the United States Court of Appeals, unreported, is printed in the Appendix at Page A. The opinion of the United States District Court for the Eastern District of Kentucky, unreported, is printed at Page B of the Appendix.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. The date of entry of the judgment or decree sought to be reviewed is February 26, 1991.

2. There has not been an order respecting a rehearing or granting an extension of time to file the petition for writ of certiorari.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment or decree in question by writ of certiorari is 28 U.S.C. Section 1254 (1).

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE ARE AS FOLLOWS:

Article 3, Section 2, Clause 1 of the United States Constitution
Subjects of jurisdiction.
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Title 28, USC Section 1332(a) (1)
1332. Diversity of citizenship; amount in controversy; costs
(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—
(1) Citizens of different States;

Rule 15(a) FRCP
Amended and Supplemental Pleadings
(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Constitution of Kentucky, Section 157
Maximum tax rate for cities, counties and taxing districts—Indebtedness exceeding income provided for year not to be incurred without popular vote.—The tax rate of cities, towns, counties, taxing districts and other municipalities, for other than school purposes, shall not, at any time, exceed the following rates upon the value of the taxable property therein, viz.: For all towns or cities having a population of fifteen thousand or more, one dollar and fifty cents on the hundred dollars; for all towns or cities having less than fifteen thousand and not less than ten thousand, one dollar on the hundred dollars; for all towns or cities having less than ten thousand, seventy-five cents on the hundred dollars; and for counties and taxing districts, fifty cents on the hundred dollars; unless it should be necessary to enable such city, town, county, or taxing district to pay the interest on, and provide a sinking fund for the extinction of, indebtedness contracted before the adoption of this Constitution. No county, city, town, taxing district, or other municipality, shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same.

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BOYD COUNTY BOARD OF EDUCATION
Petitioner

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UNITED STATES FIDELITY & GUARANTY CO.
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, The Chief Justice, and Associate Justices of the Supreme Court of the United States: Boyd County Board of Education, the petitioner herein prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Sixth Circuit:

STATEMENT OF THE CASE

In 1984, the Boyd County Board of Education[1] was required to expand its high school at Cannonsburg, Kentucky. The cost was approximately $3,200,000.00, far more than this rural school system could legally borrow under Kentucky's 1891 Constitution. (Section 157 reproduced above). A strategem sanctioned by the Kentucky courts was used to avoid the debt limitation. The school board conveyed the real estate to Boyd County, Kentucky, which then leased it back to the school board. Each year's rent paid interest and retired some of the debt on school building revenue bonds sold by the county as owner. The school's liability was limited to the annual rent, and the county's liability was limited to the proceeds of the bond sale and the rent it received from the school. The county as owner contracted with a West Virginia construction company which abandoned the job after drawing most of the contract funds. Respondent, United States Fidelity & Guaranty Company, was surety on the builder's performance and payment bond.[2] The county as owner took over the job to complete it, but there was insufficient money remaining in the construction account to finish, a dilemma the bonding company declined to remedy, ameliorate or, in fact, have anything to do with it at all.

The county/owner had no duty to provide additional funds. The school board had to draw money from other school accounts (approximately $725,000.00) to complete the building so that it could accommodate its students. It joined with the owner/county in the present suit against the bonding company in state court, which was shortly removed to United States District Court for the Eastern District of Kentucky with jurisdiction under 28 USC 1332 and 28 USC 1441 by the non-resident insurance company. By a bewildering ruling and turn of events in 1987 (Appendix Page C), the school board was barred from going forward in any court with its suit against the bonding company, which successfully persuaded the district court its liability was "secondary" so that it was above and beyond the fray until another lawsuit by the West Virginia contractor against the county/owner was determined. That determination

[1] A public corporate body politic (without parents or subsidiaries) which administers a school district coterminous with the county in which it is located.
[2] The Boyd County Board of Education and United States Fidelity & Guaranty Company are the only parties to these proceedings.

finally occurred two years later in 1989 when both contenders threw in the towel and reciprocally dismissed their claims without recovery for either. The school board had been a party to the contractor-owner suit, but the school was dismissed since it was not the owner or contracting party as it could not be under the constitutional restrictions discussed above.

With the owner-contractor suit concluded, the school board undertook in 1989 to proceed with its action against the bonding company by amending its complaint to claim the total amount it had to spend to finish its school building and seeking subrogation to the rights of the workmen whom it had paid against the payment bond executed by the bonding company. The District Court agreed the payment bond covered these workmen but refused to permit amendment and, instead, dismissed the suit out of hand. Thus, this school board has lost three quarters of a million dollars on work the bonding company's principal was supposed to perform. The school was denied any forum to seek recovery of its money.

The District Court's judgment considered the school board a volunteer because it spent money to finish its own school. The Court considered its conduct inequitable because the school system did not participate in the suit between the contractor and county—though the school board was constitutionally prohibited from doing so. All of these factual determinations were made without proof solely on the bonding company's motion to dismiss and the school board's motion to amend its complaint. Judgment was affirmed without opinion by the United States Court of Appeals for the Sixth Circuit which had jurisdiction of the appeal under 28 U.S.C. Section 1291.

ARGUMENT

The school board did not select the federal courts for redress of its losses. But diversity and removal are not meant to totally forestall all remedies by depriving a litigant of any forum at all under *Erie R.Co. v. Tompkins*, 304 U.S. 64 (1938), thus affording a non-resident defendant immunity a local defendant-building contractor would have never enjoyed in the Kentucky courts.

It is not an issue of construing Kentucky law but of the availability of the federal court to entertain the school board's claim so that any law at all, Kentucky, federal or otherwise, could be applied to the issues.

It has not been contended on appeal that the District Court's order of May 18, 1987, abating the school's action against the

bonding company was correct. It could not be. A surety's liability is primary and absolute. *Home Indemnity Co. of New York v. O'Brien*, 104 F.2d 413 (6th Cir. 1939); *U.S. Industries, Inc. V. Blake Construction Co.*, 671 F.2d 539 (D.C.Cir. 1982). The school system was entitled to proceed in 1987 on the separate obligation imposed by the payment bond. *Fleishman Construction Co. v. United States*, 270 U.S. 349 (1926); *Equitable Surety Co. v. United States*, 234 U.S. 448 (1914). However, the order freezing the action was in place and interlocutory, so nothing can be done until the suit between the owner and contractor was concluded in 1989. At that juncture the District Court dismissed the school board's claim on grounds it had acted inequitably and as an intermeddler in providing money to complete its school building, though there has been no suggestion where the money might come from otherwise. Presumably, the school system was supposed to sit back and watch the partially completed school building deteriorate and collapse and conduct classes out in the halls of its existing facilities. All of these things, however, are evidentiary concerns, as were the questions whether the original contractor was actually in default, whether the county should have taken over the work, and the underlying and crucial question whether the school system did anything which should brand its conduct "inequitable". Since no evidence was or could be introduced, these questions were not answered because the District Court simply perpetuated the school district's status as persona non grata in the federal court system which had existed continuously from the erroneous ruling in 1987.

The Court of Appeals seemingly operating under its rule in *Self v. Wal-Mart Stores, Inc.*, 885 F2d 336 (6th Cir. 1989) deferred to the District Court's debarment and affirmed without opinion. Cf. this Court's recent decision in *Salve Regina College v. Russell*, 499 U.S. ____, 111 S.Ct. 1217, 113 L.Ed.2d 190 (Decided March 20, 1991).

There are no facts in this case. The pleadings have not even been made up. Accordingly, how the district court could determine the school board acted equitably or inequitably, as a volunteer or a party with a substantial interest to protect or, how on de novo review of law the Court of Appeals affirmed is a bewildering enigma, at least to this small school system seeking to recover public monies from a compensated surety which, through adroit though misleading technical maneuvering had successfully insulated itself from even being subject to suit.

The Boyd County Board of Education does not seek judgment here against the bonding company. Nor is it resisting a motion for summary judgment nor arguing that the facts adduced are sufficient to make out a case. All it seeks is a chance to file its claim and try to prove its case. The proceedings below depriving it of that opportunity so far depart from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision granting review by writ of certiorari.

Respectfully submitted,

COUNSEL FOR PETITIONER

APPENDIX

PAGE NO(S).

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NOT FOR PUBLICATION

90-5684

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
FEB. 26, 1991
LEONARD GREEN,
CLERK

BOYD COUNTY BOARD OF EDUCATION,	)	
Plaintiff-Appellant,	)	**On Appeal from the United States District Court for the Eastern District of Kentucky.**
v.	)	
UNITED STATES FIDELITY & GUARANTY CO.,	)	
Defendant-Appellee.	)	

BEFORE: KEITH and KRUPANSKY, Circuit Judges; and ENGEL, Senior Circuit Judge.

PER CURIAM: The Boyd County Board of Education appeals from the district court's April 26, 1990, Memorandum Opinion and Order granting United States Fidelity & Guaranty Company's motion to dismiss.

Having carefully considered the record and the arguments presented in the briefs and orally, we find no error warranting reversal. Therefore, we **AFFIRM** the order of the Honorable Karl S. Forester, United States District Judge for Eastern District of Kentucky, for the reasons set forth in his Memorandum Opinion and Order.

A TRUE COPY
Attest:
LEONARD GREEN, Clerk

By /s
Deputy Clerk

ISSUED AS MANDATE: March 20, 1991
COSTS: None

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 87-72

BOYD COUNTY BOARD OF EDUCATION, PLAINTIFF,

V. **MEMORANDUM OPINION AND ORDER**

UNITED STATES FIDELITY
& GUARANTY COMPANY, DEFENDANT.

* * * * * * * * * * *

This matter is before the Court upon the motion of defendant to dismiss this action and upon the motion of plaintiff to amend its complaint. The parties have filed various memoranda briefing the issues raised in the motions. The Magistrate filed a Report and Recommendation advising denial of plaintiff's motion to amend its complaint, granting of defendant's motion to dismiss, and dismissal of this action. The plaintiff has filed objections to the Magistrate's Report and Recommendation to which the defendant has filed a response.

BACKGROUND

Diniaco & Sons, Inc. ["Diniaco"], a general contractor, originally contracted with the Boyd County Fiscal Court ["Fiscal Court"] for construction of additions and improvements to the Boyd County High School. The Fiscal Court is the owner of the school property and raised money for the project by issuing school building revenue bonds. The revenue was placed in a school construction account. Diniaco, the Fiscal Court and the defendant, United States Fidelity & Guaranty Company ["USF&G"], executed a performance and payment bond before commencement of the work.

After a dispute developed, Diniaco left the job and refused to return. The Fiscal Court then negotiated with another contractor for completion of the project. At this point, the Boyd County Board of Education ["School Board"] took money from other accounts and deposited $725,467.80 into the school construction account. The project was subsequently completed, of which $725,087.32 was utilized from the school construction account for the completion.

Diniaco filed suit against the Fiscal Court and the School Board for breach of the construction contract.[1] The Fiscal Court filed a counterclaim alleging Diniaco breached the contract. In that action this Court held the School Board was not a party to the construction contract, thus this Court dismissed the School Board as a party from the suit. That action was eventually settled between Diniaco and the Fiscal Court, among others, and the action was dismissed with prejudice on May 17, 1989.

As a result of the circumstances regarding the construction of the high school, the Fiscal Court and the School Board initiated this action against the surety, USF&G, on the performance and payment bond for the additional expenses incurred in completing the project with a different contractor. Pursuant to agreement of the parties, the Fiscal Court has been dismissed as a party plaintiff. Therefore, only the School Board is currently asserting a claim against USF&G on the performance and payment bond.

DISCUSSION

A. Extent of Coverage Under the Bond

USF&G has filed a motion to dismiss this action. As grounds for the motion, it argues that the School Board cannot maintain an action on the bond because the School Board was not a contracting party to either the bond or the underlying construction contract. In response, the School Board seeks to amend its complaint to allege "equitable subrogation." In other words, the School Board, by paying sums to the various laborers and materialmen to complete the project, contends it is entitled to stand in the shoes of the laborers and materialmen to assert a claim against the performance and payment bond.

In his Report and Recommendation, the Magistrate first concluded that the terms of the bond only name the Fiscal Court as a beneficiary, and does not allow those who did not contract with the original contractor, Diniaco, to constitute beneficiaries under the bond. The Magistrate found that the School Board's "claim" is not a claim for labor performed or material furnished in connection with the performance of the contract *between Diniaco and the Fiscal Court*. The monies advanced by the School Board were used to pay

[1] Civil Action No. 86-107, Ashland Division.

for labor performed and materials furnished in connection with the new contract *between the Fiscal Court and a new contractor.* Therefore, the School Board cannot be a third party beneficiary under the USF&G bond. Thus, the Magistrate concluded that only those subcontractors that performed labor or supplied materials in connection with the contract *between Diniaco and the Fiscal Court* may be third party beneficiaries under the USF&G bond.

However, a reading of the bond itself suggests otherwise. The bond terms allow the Owner to pursue claims for all cost incurred due to the failure of Diniaco to complete the project:

> [W]e...Phillip Diniaco & Sons, Inc.,... as Principal, and ...United States Fidelity and Guaranty Company,... as Surety, are held and firmly bound unto the... Boyd County Fiscal Court,... hereinafter called the Owner, in the penal sum of Three Million Two Hundred Eighteen Thousand DOLLARS ($3,218,000.00) for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns for the faithful performance of a certain written contract, dated 1st day of August, 1984, entered into between the Principal and the Owner, for the construction of... Additions and alterations to Boyd County High School, Cannonsburg, Kentucky....
>
> NOW THEREFORE, the conditions of this obligation is [sic] such that if the Principal shall faithfully perform the terms and conditions of the contract in all respects on their part, and shall pay all obligations incurred in connection therewith, all such other obligations of every form, nature and character, and shall save harmless the Owner from all and any liability of every nature, kind and character which may be incurred in connection with the performance or fulfillment of such contract or other such liability resulting from negligence or otherwise on the part of such Principal and further shall save harmless the Owner from *all costs and damage which may be suffered by reason of the failure to fully and completely perform said contract* and shall fully reimburse and repay the Owner for all expenditures of every kind, character and description which may exist on the part of the Principal in connection with the performance of said contract, and further that the Principal shall pay all lawful claims of all persons, firms, partnerships or

> corporations for labor performed . . . and material furnished in connection with the performance of the contract, and that the failure to do so with such persons, firms[,] partnerships or corporations shall give them direct right of action against the Principal and Surety under the obligation. . .

PERFORMANCE AND PAYMENT BOND, at 1 (emphasis added).

Thus, this Court concludes that the bond itself does provide for recovery of damages associated with Diniaco's failure to complete the project, *including those damages stemming from hiring a new contractor to complete the project.* In addition, Section 19 of the general conditions of the construction contract provides that if the original contractor, Diniaco, fails to complete the work then, after various notices, the owner "may without prejudice complete the work." That obviously happened in the present case. The Fiscal Court retained new contractors to complete the high school project. Thus, these new contractors are fully entitled to the protection of the performance and payment bond to meet this very contingency.

It is implausible to conclude that the bond securing performance ends upon default by Diniaco. The prime contractor cannot cancel the payment bond by abandoning the project. There is simply no distinction in the coverage of the bond between those suppliers hired by the original contractor and those who separately contract to complete the project after default. The clear meaning of the bond terms requires this result. This bond is required by the Kentucky Education Department and is a *project* bond, and the obligees are not limited to people hired by the original prime contractor.

Thus, the Fiscal Court as owner of the project had a contractual right to assert a claim against the surety for damages associated with Diniaco's failure to complete the project. The new contractors had a right to seek payment from the Fiscal Court as owner, and the Fiscal Court had a right to pursue claims against Diniaco and the Surety. However, the Fiscal Court settled its claims against Diniaco in its counterclaim in the other action. In any event, by agreement of the parties the Fiscal Court has been dismissed as a party plaintiff in this action. Therefore, the Fiscal Court is not asserting any claim against the surety for additional amounts expended due to Diniaco's failure of performance. The Court now turns to the School Board's assertion of equitable subrogation.

B. The Doctrine of Equitable Subrogation

The issue posed is whether the School Board can be subrogated to the position of the laborers and materialmen, or even to the position of the Fiscal Court, in the bond contract to assert a claim for the monies placed in the school construction account and expended to complete the project. This issue centers on the School Board's motion to amend its complaint to assert application of the doctrine of equitable subrogation. In this regard, the Magistrate also concluded in his Report and Recommendation that, even assuming later suppliers and laborers hired to complete the project were entitled to protection under the bond, the School Board is not entitled to assert equitable subrogation. The Magistrate found the School Board was a "volunteer" as a matter of law in contributing funds to complete the project, thus barring its claim of equitable subrogation.

The equitable principle of subrogation is also referred to as "legal subrogation." According to Kentucky courts, entitlement to subrogation revolves upon consideration of five factors:

1) payment by one of the debt of another;

2) subrogee is not a volunteer;

3) the debt is not one for which the subrogee is primarily liable;

4) the entire debt must be paid unless the others who made payment are joined; and

5) subrogation must not work any injustice to the rights of others.

Bryan v. Henderson Elec. Co., 566 S.W.2d 823, 825 (Ky. App. 1978).

The Kentucky high court has strictly limited application of equitable subrogation. *United Pac. Ins. Co. v. First Nat'l Bank*, 457 S.W.2d 833, 835 (Ky. 1970); *York v. Cline Constr. Co.*, 336 S.W.2d 34, 37 (Ky. 1960). The doctrine "cannot be used as a universal remedy for parties who have lost their money." Id. at 38. Subrogation is an equitable remedy, and "[i]n the award of equitable remedies there is normally an element of great discretion." *W. Casualty & Sur. Co.* v. Meyer, 301 Ky. 487, 493, 192 S.W.2d 388 (1946).

The most pertinent element to this action is the requirement that the subrogee not be a volunteer. "An interloper or a volunteer who, with no legal obligation to do so, pays the debt of another, is

not entitled to invoke the equitable doctrine of subrogation." *Vance v. Atherton*, 252 Ky. 591, 594, 67 S.W.2d 968 (1934). This Court agrees with the Magistrate that the School Board is a "volunteer" and therefore not entitled to assert subrogation as a matter of law.

The School Board was under no legal obligation to take monies from other accounts and deposit them into the school construction account. Although counsel for the School Board points to a host of practical considerations that led the Board to expend the sums to complete the school project, these do not equate to a legal obligation.

Futhermore, in exercising its discretion not to invoke the equitable remedy of subrogation, the Court notes that the School Board ardently disclaimed any ownership interests in the high school in the other lawsuit involving the disputes under the construction contract. Throughout the proceedings of Ashland Civil Action Number 86-107, the School Board maintained that it was not a party to the construction contract, that it bore no responsibility for the problems with the project, and that Diniaco, the prime contractor, dealt with it "at its own peril."

Diniaco had attempted to show substantial breaches of the construction contract by the School Board, however this Court granted the School Board's motion to dismiss finding that the School Board was not a party to the construction contract nor in sufficient privity with the Fiscal Court to justify a breach of contract action against the School Board.

For the School Board to sit out the contest of responsibility, denying its identity as the Owner, and then be permitted to claim the status of a beneficiary under the performance and payment bond executed for the benefit of the owner and suppliers of labor and materials would be inconsistent and unjust. The sword must cut both ways with equity.

Therefore, the School Board's voluntary payment of funds to the laborers and materialmen for completion of the high school voids its attempt at assertion of subrogation. Furthermore, the conflicting stances of the School Board as to its posture in this matter leads the Court to view less need for the requested equity.

The plaintiff argues that whether it constitutes a "volunteer" is a question of fact for the jury. This Court disagrees. The subrogation remedy is one of equity. Courts, not juries, determine whether equity applies in a given circumstance. Although there are fact issues that juries may consider regarding equitable claims, the issue of whether the plaintiff is entitled to assert the doctrine in the

fact instance is a question of law. This Court concludes that the plaintiff has not sufficiently shown entitlement to the doctrine of equitable subrogation as a matter of law. Since the plaintiff is not entitled to assert equitable subrogation, there is no need to amend its complaint.

Therefore, it is hereby ORDERED:

1) that the plaintiff's objections to the Magistrate's Report and Recommendation are GRANTED as to the extent of coverage under the performance and payment bond;

2) that the plaintiff's objections to the Magistrate's Report and Recommendation are DENIED as to the doctrine of equitable subrogation and as to the plaintiff's motion to amend its complaint;

3) that the plaintiff's motion to amend its complaint is DENIED:

4) that the defendant's motion to dismiss is GRANTED and this matter is DISMISSED WITH PREJUDICE at the plaintiff's costs; and

5) that this matter is STRICKEN from the active docket. This 26th day of April, 1990.

/s

KARL S. FORESTER, JUDGE

Date of Entry and Service:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

CIVIL ACTION NO. 87-72

BOYD COUNTY BOARD OF EDUCATION,
AND BOYD COUNTY FISCAL COURT, PLAINTIFFS

VS. ORDER

UNITED STATES FIDELITY &
GUARANTY COMPANY, DEFENDANT

This action is before the Court upon the plaintiffs' motion to consolidate this action with Civil Action No. 86-107, wherein Phillip Diniaco & Sons, Inc. has sued Boyd County Fiscal Court for breach of contract.

In support of the motion, the plaintiffs state that both actions involve the same operative facts concerning the construction of additions and alterations at the Boyd County High School and that the same questions of law and fact will be involved in both actions. The plaintiffs have noted that the parties are not identical.

The defendant has responded by reiterating and adopting the response/objection of Diniaco in #86-107, which states that the actions should not be consolidated for the following reasons: First, this Court determined on September 26, 1986, that the Boyd County Board of Education was not a proper party in #86-107. Diniaco and USF&G contend that consolidating the actions would be tantamount to allowing a party who was not a proper party in the first action to become a party. Second, Diniaco argues that it would be prejudiced at the trial of these consolidated actions by having to share counsel table with the bonding company, USF&G, which would have the appearance of being an insurance carrier, and the bonding company would have to defend in #87-72 while Diniaco is prosecuting its breach of contract claim against the Fiscal Court. Third, there may be defenses available to USF&G which are not available to Diniaco, and finally, any claim by the Fiscal Court against the bonding company would not be ripe until the Fiscal Court is successful on its counterclaim against Diniaco in #86-107 and obtains a judgment against Diniaco.

USF&G also requests that this Court hold #87-72 in abeyance pending the outcome of #86-107 because any claim against USF&G

would not become ripe until a final order is entered in the breach of contract action.

The Court has considered the arguments of the parties and finds USF&G's arguments persuasive. Accordingly,

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

1) That the plaintiffs' motion to consolidate this action, #87-72, with #86-107 is OVERRULED;

2) That the defendant USF&G's motion to hold #87-72 in abeyance pending the resolution of #86-107 is SUSTAINED;

This 18th day of May, 1987.

/s

Henry R. Wilhoit, Jr., Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

CIVIL ACTION NO. 87-72

BOYD COUNTY BOARD OF EDUCATION
AND BOYD COUNTY FISCAL COURT PLAINTIFFS

VS. **AMENDED COMPLAINT OF BOYD COUNTY BOARD OF EDUCATION**

UNITED STATES FIDELITY &
GUARANTY COMPANY DEFENDANT

* * * * * * * * * * *

1. On or about August 1, 1984, Phillip Diniaco & Sons, Inc., contracted with the Boyd County Fiscal Court for the construction of additions and alterations of the Boyd County High School, Cannonsburg, Kentucky, for which Diniaco was to be paid the sum of $3,218,000.00 upon completion of the work in conformity with the contract.

2. On or about September 5, 1984, defendant, United States Fidelity & Guaranty Company, executed a performance and payment bond in the penal sum of $3,218,000.00, as more fully set forth in the true and correct copy of said performance and payment bond attached hereto and incorporated herein by reference marked "Boyd County Board of Education, Exhibit 1".

3. The general contractor, Phillip Diniaco & Sons, Inc., failed and refused to complete the project so that the Boyd County Fiscal Court declared the contractor in default, notified United States Fidelity & Guaranty Company of said default, and stepped into the shoes of Diniaco and undertook completion of the project pursuant to Article 19 of the General Conditions, a true and correct copy of which is attached hereto and incorporated herein by reference, marked "Boyd County Board of Education, Exhibit 2".

4. Even though notice of the default by Diniaco had been served on the defendant, United States Fidelity & Guaranty Company, it declined and refused to take any action to remedy the default or

to complete the performance of the contract, which therefore required the engagement of other construction concerns and suppliers to complete the project.

5. Acting in lieu of the defaulting prime contractor, the Boyd County Fiscal Court engaged four construction concerns to complete the project in conformity with the original contract specifications at a cost totaling $1,330,791.00, all of which was for labor performed and materials furnished in connection with the contract project as described in the performance and payment bond and, in particular, the "Additions and Alterations to Boyd County High School, Cannonsburg, Kentucky".

6. On account of the previous payments to Diniaco, there were insufficient funds remaining in the construction account to pay the laborers and materialmen engaged by the County to complete the project, the revenue bond funds were exhausted, and there were no other sources of revenue available to finish the school since the bonding company had refused to complete the project or to furnish any funds, financing or assistance whatever.

7. The School Board was the lessee of the premises in question which it needed in sufficiently completed and proper condition to qualify for approval by the Division of Buildings and Grounds of the Kentucky State Department of Education and so that it could fulfill the duties imposed on it by law to provide facilities for its children to attend school.

8. Accordingly, the School Board was compelled to provide money from its special voted tax fund and its foundation program capital outlay fund, intended for other purposes, in sums totaling $725,467.80, which was used to pay the laborers and materialmen who completed the project except for $380.48 which was left after completion and reimbursed to the special voted tax fund.

9. By virtue of and to the extent of such payment in net sums totaling $725,087.32, the Boyd County Board of Education is subrogated to the rights of the laborers and materialmen to recover on the payment bond executed by defendant, United States Fidelity & Guaranty Company.

WHEREFORE, plaintiff, Boyd County Board of Education, demands judgment against defendant, United States Fidelity & Guaranty Company, in the sum of $725,087.32, both prejudgment and postjudgment interest thereon as provided by law, its costs herein expended, and any other appropriate relief.

JAMES E. ADKINS II
2813 Louisa Street
Catlettsburg, Kentucky 41129

BRYAN, FOGLE & CHENOWETH
126 West Main Street
P.O. Box 442
Mt. Sterling, Kentucky 40353
Telephone: (606) 498-1442

BY: /s
ATTORNEYS FOR PLAINTIFF,
BOYD COUNTY BOARD OF EDUCATION

— CERTIFICATE OF SERVICE —

This is to certify that the foregoing amended complaint was served by mailing a true copy thereof to Phillip Bruce Leslie, Esq., of McBrayer, McGinnis, Leslie & Kirkland, P.O. Box 347, Greenup, Kentucky 41144-0347, attorney for defendant, United States Fidelity & Guaranty Company; to Jerry Vincent, Esq., Boyd County Attorney, P.O. Box 464, Catlettsburg, Kentucky 41129; and to Hon. Karl S. Forester, Judge, United States District Court, P.O. Box 278, Pikeville, Kentucky 41501, this August 15, 1989.

/s
ATTORNEY FOR PLAINTIFF, BOYD
COUNTY BOARD OF EDUCATION

Board Exhibit 1 to Amended Complaint

PERFORMANCE AND PAYMENT BOND

KNOW ALL MEN BY THESE PRESENTS, that we (Contractor, mailing address) Phillip Diniaco & Sons, Inc. P.O. Box 9409, Huntington, WV 25704 as Principal, and (Surety Co., mailing address) United States Fidelity and Guaranty Company, P.O. Box 1088, Huntington, WV 25713 as Surety, are held and firmly bound unto the (Owner, mailing address) Boyd County Fiscal Court, Boyd County Courthouse, Catlettsburg, KY 41129 Thereinafter called the Owner, in the penal sum of Three Million Two Hundred Eighteen Thousand DOLLARS ($ 3,218,000.00) for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns for the faithful performance of a certain written contract, dated 1st day of August , 19 84 entered into between the Principal and the Owner, for the Construction of (Contract description, location):

Additions and alterations to Boyd County High School, Cannonsburg, Kentucky

A copy of which said contract is incorporated herein by reference and is made a part thereof as if fully copied herein

NOW THEREFORE, the conditions of this obligation is such that if the Principal shall faithfully perform the terms and conditions of the contract in all respects on their part, and shall pay all obligations incurred in connection therewith, all such other obligations of every form, nature and character, and shall save harmless the Owner from all and any liability of every nature, kind and character which may be incurred in connection with the performance of fulfillment of such contract or other such liability resulting form negligence or otherwise on the part of such Principal and further shall save harmless the Owner from all costs and damage which may be suffered by reason of the failure to fully and completely perform said contract and shall fully reimburse and repay the Owner for all expenditures of every kind, character and description which may exist on the part of the Principal in connection with the performance of said contract, and further that the Principal shall pay all lawful claims of all persons, firms, partnerships or corporations for labor performed and for the payment of all unemployment

contributions which become due and payable under Kentucky Unemployment Insurance Law, and material furnished in connection with the performance of the contract, and that the failure to do so with such persons, firms partnerships or corporations shall give them direct right of action against the Principal and Surety under the obligation; and provided, however, that no suit, action or proceeding by reason of any default whatever shall be brought on this bond after two years from the date on which the final payment of the contract falls due; and provided further that if any alterations or additions which may be made under the contract, or in the work to be done under it, or the giving by the Owner of any extension of time for the performance of the contract or any other forebearance on the part of either the Owner or the Principal shall not, in any way, release the Principal and Surety, or either of them, their heirs, executors, administrators, successors, or assigns for their liability hereunder. Notice to the Surety of any such alterations, extensions, or forebearance being expressly waived.

This obligation shall remain in force and effect until the performance of all convenants, terms and conditions herein stipulated and after such performance, it shall become null and void.

IN TESTIMONY WHEREOF witness the hands and seals of the parties hereto on this the 5th day of September, 1984
Executed in _____ counterparts.

Phillip Diniaco & Sons, Inc.	United States Fidelity and Guaranty Company
CONTRACTOR FIRM (Typed)	BONDING COMPANY
/s	/s
CONTRACTOR'S REPRESENTATIVE (Signature and Title)	ATTORNEY-IN-FACT
(Corporate Seal)	(Corporate Seal)

	/s
WITNESS	WITNESS
	/s
WITNESS	WITNESS

NOTE: The number of executed counterparts of the Bond shall coincide with the number of executed counterparts of the contract.

COUNTERSIGNED (if necessary):

BY /s
KENTUCKY RESIDENT AGENT

Louie W. King Agency
FIRM

Ray-Bourne Building
ADDRESS

Olive Hill, KY 41164

Board Exhibit 2 to Amended Complaint

ARTICLE 19 - The Owner's Right To Do Work

If the Contractor should neglect to prosecute the work properly or fail to perform any provision of this contract, the Owner shall give written notice that the Contractor will commence and continue correction of such work within ten (10) days. After ten (10) days following receipt of the written notice by the Contractor and continued neglect of the work, the Owner will give an additional ten (10) days written notice and after that time the Owner may without prejudice complete the work.